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No. 93-187

In The

Supreme Court of the United States

October Term, 1993

IN RE HEMINGWAY TRANSPORT, INC., BRISTOL TERMINALS, INC.,

Debtors,

HERBERT C. KAHN, Trustee for HEMINGWAY TRANSPORT, INC. and BRISTOL TERMINALS, INC.,

Petitioner,

vs.

JUNIPER DEVELOPMENT GROUP, a Massachusetts Partnership; and GEORGE D. WHITTEN, AMY WHITTEN and CHARLES WHITTEN, as Trustees of 60 OLYMPIA NOMINEE TRUST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Introduction

This opposition to the Petition for Certiorari is filed by the Respondents on the grounds that while this case involves the interesting issues of the proper interplay

between the Bankruptcy Code, 11 U.S.C. §101 et seq. and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq. ("CERCLA"), it relates to such a unique set of circumstances that it will not assist in other cases where a conflict exists between bankruptcy and environmental law. Furthermore, the case does not represent a conflict in the Circuits in that the decisions cited by Petitioners are either distinguishable or are in accord with the holding of the United States Court of Appeals for the First Circuit.

In but one instance does Respondent contest Petitioner's assertions in his introduction. But it is in that one assertion that this case turns. Contrary to Respondents' assertion that Juniper is "jointly and severally liable" for all costs of removal and remediation under CERCLA (Petitioner's Brief p. 3)[1], Respondent maintains that it is precisely that issue which has led the First Circuit Court of Appeals to remand the case to the Bankruptcy Court for further proceedings. The question of whether Juniper is an innocent landowner (App. 34a for a recitation of CERCLA "innocent landowner" requirements)[2] and therefore not "jointly and severally" liable for a CERCLA claim under 42 U.S.C. §9607(b) is the linchpin of the Court's remand.

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[1] Petitioner's Brief shall hereinafter be cited as "PB".

[2] References to App. with page numbers are to Petitioner's Appendix attached to its petition as distinguished from the Joint Appendix, hereinafter "JA", filed with the First Circuit.

B. Substantive Facts

While Petitioner correctly outlines many of the facts as they relate to the transaction which led to this appeal, he fails to reference a number of critical matters upon which the lower court relied in reaching its opinion. These include facts which lead the First Circuit to consider carefully the issue of the "innocent landowner" and its bearing upon Respondents' claims for administrative priority on its Superfund claims.

As the court noted, the subject drums were first discovered on the property at issue almost three (3) years prior to Juniper Development Group's purchase of the land (App. 3a-3b). On August 15, 1980, William Cashins, an employee of the Massachusetts Department of Environmental Quality Engineering (DEQE) (JA 264-266) found the drums and immediately put Hemingway Transport Company, the debtor herein and the owner of the land, on notice, both by letter and in person, of the discovery of the drums (JA 283-284). Hemingway Transport acknowledged their presence and advised the DEQE in November, 1980, that it would resolve the problem by removing the drums (JA 284-286) assuring the State, through Cashins, that Hemingway would obtain estimates from licensed contractors to remove them (JA 350). Despite repeated inspections by Cashins, however, the drums were never removed (JA 87-89 and 181), and in July, 1982, Hemingway and its affiliate Bristol, simultaneously filed Chapter 11 involuntary bankruptcy petitions. While at least the State had notice of the bankruptcy (JA 286), neither they nor EPA acted to file a proof of claim in the debtors bankruptcy. Indeed, neither even apparently re-visited the area, even though it was

allegedly within a Superfund site, for another two (2) years, until 1985 when the drums were re-discovered (JA 178). By that time, the property had been placed on the market for sale pursuant to the Chapter 11 Bankruptcy of Hemingway and Bristol and was purchased by the Respondents in May, 1983 (JA 220).

One of the Respondents, Charles Whitten, and other Juniper representatives undertook physical inspections of the 6½ acre property (JA 223-230) when the property was placed on the market in 1983. The property, completely bifurcated by the Aberjona River (JA 225-228), had usable parcels on one side for warehousing, and unusable swamp and wetlands across the river. One could only get directly from one side of the property to the other by using a boat across the river (JA 291). According to Whitten, the subject drums were not discovered during his Spring inspection because they were virtually inaccessible in the southern most panhandle of the property which is for many months of the year covered by water (JA 225-228).

Moreover, when inquiry was made by Whitten of the debtor's representative, David Butcher, prior to Juniper's purchase of the property, the presence of hazardous substances was expressly denied by Butcher (JA 229-237). This despite the fact that Butcher had been advised directly by environmental representatives that the barrels were on the site and had to be removed (JA 277 & 286).[3]

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[3] N.B. There is an error in the pagination of the joint appendix. JA 277 & 286 represent consecutive pages 87 & 88 in the trial transcript below.

The sale to Juniper through its general partner, George Whitten, was approved by the Bankruptcy Court on April 27, 1983 (Gabriel, J.). The Order authorized the sale to Respondents for a cash price of $1,632,000 and payment of a portion of the proceeds of such sale to the mortgage holder. The Order authorizing sale was subsequently approved by U.S. District Court Judge Rya W. Zobel on May 3, 1983. Said sale, "free and clear of all liens and encumbrances", took place on May 18, 1983 (JA 194).

While the EPA and Massachusetts DEQE were still working in the area as part of their Superfund review of the nearby Wells G & H, neither notified Juniper of the existence of the barrels until December, 1985 (JA 239). No notice was sent to the court or to any other party to the transaction that barrels had been found on the site and no proof of claim was filed by EPA (App. 18a & JA 172-174). Once the EPA showed Juniper the location of the drums and the EPA performed tests on the contents of the drums and the surrounding soil (JA 197), it thereafter served Juniper with a "Notification of Potential Liability" (JA 239), issuing an administrative order to Juniper as the current owner of the property to remove the drums and surrounding soil (JA 120 & 241). In fully complying with that order, Juniper engaged technical consultants for the removal work at a cost of $30,208.02 (JA 195).

Despite the compliance with this order and the complete cooperation of Juniper, the EPA refused to grant Juniper "innocent landowner" status under CERCLA and instead two (2) years later, on April 20, 1988, placed Juniper on notice that it was deemed a potentially responsible party under CERCLA and that the subject

property, 60 Olympia Avenue, was now considered part of the Wells G & H Superfund Site (JA 120). On February 3, 1989, the EPA notified the Trustee of Hemingway and Bristol's potential liability under CERCLA as a former owner or operator of the site and yet still did not file a proof of claim (JA 126). Instead, the EPA demanded payment from Juniper of over $2.1 million plus interest in past costs incurred pursuant to Section 107(a)(4)(B) of CERCLA. EPA further refused to become a party to this action (App. 18a) notwithstanding Juniper's best efforts to induce EPA to file its claim (App. 24a).

On September 14, 1989, the EPA issued its CERCLA Record of Decision with regard to the Wells G & H Site including the Respondents' property, estimating the cost to clean-up the Respondents' property alone as $6.2 million (JA 255-256).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The First Circuit Decision In *Hemingway* Is Not In Conflict With The Reported Decisions Of Other Courts Of Appeals.

The Petitioner suggests that this Court ought to consider this Petition on the grounds that there is a conflict between *In re Charter Company*, 862 F.2d 1500 (11th Cir. 1989), *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991), and this case. It is Respondents' position that *Charter* is distinguishable and that the First Circuit followed *Dant & Russell*.

In *Charter*, each of the claimants were named defendants in an existing action brought by various third-party plaintiffs, each of whom had already incurred environmental clean-up costs and then subsequently sought contribution or indemnity from the *Charter* claimants. The *Charter* claimants in turn, brought claims solely for contribution or indemnity against the bankrupt estate. *In re Charter*, 862 F.2d at 1502. Furthermore, the claimants' action was brought expressly under CERCLA §113(f) 42 U.S.C. §9613(f)(1) and not under 42 U.S.C. §9607, so that the claim was, by definition, one "for which they were liable with the debtor." *Id.* at 1502-1503. Thus, the precise issue before the court below, the applicability of §502(e)(1)(B) to Juniper's rights to a direct CERCLA response cost claim under §107, was not specifically addressed by the *Charter* court.

> We need not consider the hypothetical claims which Syntex and NEPACCO [claimants] might assert, however, since their proofs of claim in this case are not of that type. Instead of alleging recompense due under CERCLA for response costs incurred *directly* by them, Syntex and NEPACCO merely allege in their proofs of claim that they are entitled to compensation or reimbursement for response costs *incurred by the Missouri plaintiffs* for which Syntex and NEPACCO may be ultimately judged liable.

Charter, 862 F.2d at 1503 (*emphasis* in original).

The existence of an underlying plaintiff to which debtor and claimant are both potentially liable, was the crucial distinguishing feature between the *Charter* court and the issues facing the First Circuit.

As for *In re Dant & Russell Inc.*, 951 F.2d 246 (9th Cir. 1991), Petitioner now argues that a case upon which Respondent relied below is now in conflict with the First Circuit's opinion. Juniper relied upon *Dant & Russell* because it held that §502(e)(1)(B) *does not* exclude the creditor's direct, albeit contingent claims against the debtor to recover sums it had expended and would expend to remediate hazardous wastes at its property.

Dant & Russell concerned a CERCLA claim brought by a lessor of property ("BN") against the lessee ("D&R") for toxic contamination. As in this case, BN had originally incurred costs as a result of an EPA order and then sought recovery for past and future response costs. *Id.* at 247. BN requested and received the $7 million judgment for future responses costs, and the debtor appealed on the grounds that §502(e)(1)(B) mandated disallowance of the claim.

The Ninth Circuit commenced its analysis by noting "[w]hile the EPA reserved the right to take additional action against BN, it has not to date required BN to take actions other than those demanded by the Order." *Id.* at 247. (The EPA's position vis-a-vis Juniper in this case is identical). The court then analyzcd the complementary relationship between §502(c) and §502(e)(1)(B). "Section 502(c) permits the estimation of contingent or unliquidated damages so that the delay in the administration of the estate may be avoided. Accordingly, §502(e)(1)(B) was drafted to prevent competition between a creditor and his guarantor for the limited proceeds of the estate." *Id.* at 248 (citations omitted).

The First Circuit in this case followed closely the *Dant* court's rejection of the claim that since the future response costs claim against the debtor "depends on the uncertain action of EPA", the potential creditor ought not to recover:

> It is also well settled that §9607(a)(1-4)(B) permits a private party to recover from a responsible party response costs it incurs itself in conducting clean-up pursuant to CERCLA – even absent intervention by the state. *Rickland Oil Terminals, Inc. v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986).
>
> The CERCLA private right of action encourages voluntary private action to remedy environmental hazards. In this way, it furthers CERCLA's goal of responding to hazardous situations quickly. EPA arm twisting is not a prerequisite for filing a §9607(a)(4)(B) claim. *Id.* at 248.

The Ninth Circuit, just as the First Circuit has done in this case (App. 37a), remanded the case for estimation of future response costs, suggesting that a trust fund would be an appropriate equitable device to ensure proper site clean-up. *Id.* at 250.

While the Petitioner properly defines administrative expenses and cites to numerous cases supporting the proposition that the administrative expenses must be actual and not contingent, he fails to note that the court remanded the matter to the bankruptcy court for further hearings on the issue of whether Juniper is thereby not "strictly, jointly and severally liable" to the EPA and thereby barred by §502(e)(1) limitations. (App. 29a-32a). The First Circuit is therefore not in conflict with any other

circuit decision since it specifically requires a finding of fact that Juniper was an innocent landowner and thereby entitled to the administrative priority based on an estimate of the actual cost to clean-up the site. Furthermore, no other case has considered the effect of the innocent landowner defense where a sale of property resulted in a potential transfer of all the estate's environmental liability. Thus, while the remedy ordered by the Court may be unique, it is in response to a unique set of circumstances.

II. The First Circuit's Decision Is Not In Conflict With *Reading Co. v. Brown*

The First Circuit properly relied on *Reading Co. v. Brown*, 391 U.S. 471 (1968) despite Petitioner's claims that the only "post petition" event carried out by the debtors' business was the sale of the property which Juniper voluntarily purchased. What the First Circuit and the Bankruptcy Court were concerned about, however, was not simply the purchase and sale agreement which referenced environmental laws and lack of warranties, but the fact that the debtor-in-possession purposely hid information about the twelve subject barrels from the purchaser and set up a chain of events which, as the First Circuit noted, may "occasion a pointless financial loss to Juniper and result in a windfall to the Chapter 7 estate, notwithstanding Juniper's best efforts to induce EPA to file its claim." (App. 24a). The fairness language of *Reading* was of particular concern to the First Circuit. Obviously, when one purchases a parcel of land for $1.6 million, he does not expect to soon after have an environmental liability of

nearly $6 million. Juniper had purchased one of the largest assets of the debtor, its purchase price representing a major portion of the estate. To now suggest that the Bankruptcy Rules and *Reading* have no room to permit Juniper "to collect ahead of the Debtors' remaining creditors," when the Debtor in a post Chapter 11 act neglected to advise the purchaser of the existence of drums on the site, is simply extraordinary. Had it not been for the substantial purchase price paid by Respondents, it is a truism that the Trustee would have a smaller corpus to distribute among creditors. The Bankruptcy Court found, and the Circuit Court confirmed, that Juniper, just as the creditors in *Reading*, found itself "in a dilemma not of [its] own making." *Id.* at 483.

Additionally, *Reading* is not limited to post petition *torts* but has been applied to any post petition activity so long as it results in the incurrence of liability. *See e.g., In re Charlesbank Laundry, Inc.*, 755 F.2d 200 (1st Cir. 1985); *In re Mammoth Mart, Inc.*, 536 F.2d 950, 955 (1st Cir. 1976); *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983); *Carter-Wallace, Inc. v. Davis-Edwards Pharmaceutical Corp.*, 443 F.2d 867, 874 (2nd Cir. 1971).

In *Charlesbank*, the First Circuit relied on *Reading* in holding that a civil compensatory fine for the debtor-in-possession's post-petition violation of a state court injunction was an administrative expense. The First Circuit, reversing the District Court which had affirmed the denial of administrative expense priority by the Bankruptcy Court, held:

> The debtor in this case *deliberately* continued a violation of law month after month presumably because it was more lucrative for the business to

> operate outside the zoning ordinance than within it. If fairness dictates that a tort claim based on negligence should be paid ahead of pre-organization claims, then, *a fortiori*, an intentional act which violates the law and damages others should be so treated.

In re Charlesbank, 755 F.2d at 202.

The First Circuit correctly applied the rationales and holding in *Reading* in ruling that the response costs incurred by Juniper are entitled to administrative expense priority. "Clearly, if damages leading to a negligence claim against a receiver qualify as administrative expenses then so do damages giving rise to a strict liability claim against a Chapter 11 debtor-in-possession under CERCLA". *In re Hemingway Transport, Inc.*, 73 B.R. 494, 505 (Bankr. D. Mass. 1987).

In determining whether administrative expense priority should be applied the inquiry focuses on the post-petition actions or inactions of the debtor-in-possession/ trustee.

> It is only when the debtor-in-possession's actions themselves – that is, considered apart from any obligation of the debtor – give rise to a legal liability that the claimant is entitled to the priority of a cost and expense of administration. When the debtor-in-possession commits a tort, *See, Reading Co. v. Brown*, 391 U.S. 417 (1968), or accepts services without paying for them, the debtor-in-possession itself causes legally cognizable injury, and the resulting claims for compensation are entitled to first priority.

Mammoth Mart, 536 F.2d at 955.

It is not only Hemingway's sale of the property to Juniper that gives rise to Juniper's actionable claims; Hemingway is statutorily strictly liable by virtue of Hemingway's ownership of the property at the time of disposal of hazardous substances. Since Hemingway's ownership and resulting CERCLA liability extended post-petition, as a debtor-in-possession, Juniper's claims against Hemingway were properly found to have administrative expense priority.

III. The First Circuit's Decision Does Not Conflict With The Midlantic National Bank Line Of Cases

Petitioner argues that the First Circuit's opinion conflicts with the *Midlantic National Bank* line of cases. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S.Ct. 755 (1986). Curiously he does not, however, argue that the First Circuit's decision conflicts with *Midlantic* itself. This is not surprising since *Midlantic* has been relied on by Respondent since the commencement of this action. *Midlantic* not only holds that "Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise curtail the exercise of a trustee's powers", 106 S.Ct. 755 at 762, but also held that: "Congress has repeatedly expressed its legislative determination that the trustee is not to have carte blanche to ignore non-bankruptcy law" and that "efforts of the trustee to marshall and distribute the assets of the estate must yield to governmental interest in public health and safety." *Id.* at 760.

Indeed, the Supreme Court specifically rejected the trustees' argument in *Midlantic* that he ought not to be

subject to environmental statutes "when he is liquidating [the estate]." *Id.* at 762. Certainly liquidation includes not only the abandonment of the property but also the sale of the property to an unsuspecting purchaser. There is nothing in *Midlantic* which requires that the property at issue be "property of the estate" at the time the costs were incurred. Rather, there is a warning to trustees and debtors-in-possession that they, just like solvent property owners, will retain liability when environmental damage occurs during their custody of the premises.

Finally, Petitioner suggests that there is no "imminent and identifiable harm" to the public health and safety as required by *Midlantic. Id.* at 762-63 n.9. While the Respondents themselves have attempted to suggest this to the EPA, they still face demands from the EPA to perform a Superfund clean-up valued at nearly $6.2 million with a claim by EPA that the property is part of one of the largest Superfund sites in America. Petitioner is hardly in a position to suggest at this time that the drums present only a "minor threat" to the environment.

IV. The Petition Ought To Be Denied Because This Case Presents No Opportunity For The Court To Answer Questions Of Broad Applicability To The Issues Confronting The Proper Balance Between The Competing Objectives of CERCLA And The Bankruptcy Code

This case offers a unique set of circumstances which are not likely to be duplicated in other cases involving bankruptcy and CERCLA, including:

1. Purchase of property from a Chapter 11 debtor-in-possession, who knew about contaminated barrels on the property, but failed to notify the purchaser or the court in seeking approval of the sale.

2. Contamination on the property for which the government had notice for more than two (2) years prior to the sale, where the government failed to ensure that the incident barrels were removed in a timely manner.

3. Government agencies who failed to file notices of claim against the bankrupt estate despite actual knowledge of the contamination and the bankruptcy.

4. Failure of the government agencies even as of this date to file a notice of claim against the bankrupt estate despite invitations to do so.

5. The decision by the EPA nearly eight (8) years after the alleged contamination was discovered to include the property for the first time as part of a larger nearby Superfund Site (JA 120).

6. Failure of the government to date to file an enforcement action against the Respondents, despite naming them a potentially responsible party in 1988, thereby requiring the lower court to establish mechanisms for estimating the future loss to the Respondents.

This Court has expressed its concerns that in exercising its discretion on a petition for a writ of certiorari, it must consider those cases which "involve principles the settlement of which is of importance to the public as

distinguished from that of the parties . . . " *Lane & Bolle Corp. v. Western Well Works, Inc.*, 261 U.S. 387 392-393 (1923). There seems little doubt that Respondents' individual plight was of great concern to the First Circuit. As the court pointed out: "Juniper finds itself stranded at the increasingly crowded 'intersection' between the discordant legislative approaches embodied in CERCLA and in the Bankruptcy Code." (App. 7a). Indeed, the Circuit Court expressed its concern for Respondents by noting that Juniper may be subject to "pointless financial loss" (App. 23a-24a) particularly in light of the fact that the lower court "may have considered Juniper's responsibility of any contamination extremely minimal, especially in comparison to Hemingway-Bristol." (App. 36a-37a). The First Circuit reflected upon these unique facts, which are unlikely to be repeated and fashioned a potential remedy not likely to be available to other creditors. Indeed, one could hardly imagine that the inharmonic convergence of property owner silence, government inaction and inaccessible wetlands would occur again.

Thus, while the applicability of §502(e)(1)(B) of the Bankruptcy Code to contingent claims under CERCLA may be unique to this case, it is not likely to have applicability to other CERCLA claims because of the unusual facts faced by the Circuit in its review.

CONCLUSION

For the reasons stated and on the authorities cited, the Respondents request that the trustee's petition for a writ of certiorari be denied.

Respectfully submitted,

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